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RIEFS

No. 13-356

Supreme Court, U.S.
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In The
Supreme Court of the United States

CONESTOGA WOOD SPECIALTIES CORP., et al.,

Petitioners,

v.

KATHLEEN SEBELIUS, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF FOR FREE SPEECH FOR PEOPLE, AUBURN THEOLOGICAL SEMINARY, AND HOLLENDER SUSTAINABLE BRANDS, LLC, AS AMICI CURIAE SUPPORTING RESPONDENTS

RONALD A. FEIN
Counsel of Record
JOHN C. BONIFAZ
FREE SPEECH FOR PEOPLE
48 North Pleasant Street,
Suite 304
Amherst, Massachusetts 01002
(413) 253-2700
rfein@freespeechforpeople.org

JEFFREY D. CLEMENTS
9 Damonmill Square,
Suite 4B
Concord, Massachusetts
01742
(978) 287-4901

BEN T. CLEMENTS
CLEMENTS & PINEAULT, LLP
24 Federal Street
Boston, Massachusetts 02110
(857) 445-0133

Library of Congress

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INTEREST OF AMICI CURIAE

With the parties' consent, amici curiae file this brief in support of Respondents Kathleen Sebelius, Secretary of Health and Human Services, et al.[1]

Free Speech For People is a national non-partisan campaign committed to the propositions that the Constitution protects the rights of people rather than state-created corporate entities; that the people's oversight of corporations is an essential obligation of citizenship and self-government; and that the doctrine of "corporate constitutional rights" improperly moves legislative debates about economic policy from the democratic process to the judiciary, contrary to our Constitution. Free Speech For People's thousands of supporters around the country engage in education and non-partisan advocacy to encourage and support effective government of, for and by the American people.

Auburn Theological Seminary is a "seminary of the future" committed to building the multifaith

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[1] No counsel for a party authored this brief in whole or in part. No counsel or party made a monetary contribution intended to fund the preparation or submission. No person or entity other than amici, their members, or their counsel contributed monetarily to preparation or submission of this brief. Counsel of record received timely notice of the intent to file the brief under Rule 37.2(a), and granted consent. Pursuant to Rule 37.3(a), both petitioners and respondents have filed with the Clerk of Court letters granting blanket consent to the filing of amicus curiae briefs in support of either or of neither party.

movement for justice. Founded in 1818, Auburn participated in the great social challenges of its early years, including the abolition of slavery and women's suffrage. Today, Auburn equips bold and resilient leaders of faith and moral courage with tools, education, research, media expertise and engagement strategies to bridge religious divides, build community, pursue justice and heal the world. Auburn also provides platforms for leaders and activists of social justice movements to convene and advance innovative, multidisciplinary solutions for collaborative change.

Hollender Sustainable Brands, LLC (HSBLLC) is the manufacturer of Sustain, the first sustainable, fair trade, Forest Stewardship Council certified condom in the United States. HSBLLC is a leader in the business community for its sustainability and corporate responsibility practices. Its founder, Jeffrey Hollender, is also an author, professor and lecturer on corporate responsibility. HSBLLC supports a vision for corporate social responsibility that involves going above and beyond the letter of the law when it comes to protecting employees and communities, rather than seeking exemptions from minimum legal requirements.

SUMMARY OF ARGUMENT

Business corporations cannot exercise religion within the meaning of the Free Exercise Clause of the

First Amendment. Petitioners suggest that business corporations have Free Exercise Clause rights because the Court has previously heard free exercise challenges raised by churches and other religious organizations. Like the dissenting judge in the Third Circuit, and the majority in the companion case *Hobby Lobby Stores, Inc.* v. *Sebelius*, 723 F.3d 1114 (10th Cir. 2013), they argue a syllogism: churches and other religious nonprofit corporations have Free Exercise Clause rights; individual business owners have Free Exercise Clause rights; therefore, for-profit business corporations have Free Exercise Clause rights. These arguments all depend on the premise that religious nonprofit corporations – separate and apart from their human members – do, in fact, have Free Exercise Clause rights.

While the Court has considered religious exercise claims by churches and other religious nonprofit corporations, these claims are best understood as examples of associational standing. Indeed, in many of these cases, the organization has explicitly challenged a law *on behalf of* its members. And even the cases that do not explicitly employ associational standing analysis are best viewed through this lens, because corporations – even religious nonprofit corporations – do not themselves exercise religion. To the contrary, corporations (as opposed to humans) derive their very existence from a government charter, and cannot hold the inherent human right to free exercise of religion. But nonprofit organizations can assert the rights of their members, and so the free

exercise cases brought by churches and other religious organizations are best understood as relying on associational standing.

In contrast, for-profit business corporations cannot raise their stockholders' constitutional claims through associational standing. The stockholders of such corporations – no matter how active in daily management, nor how close their family relations – are not comparable to the members of a membership organization. They do not possess the "indicia of membership" necessary for associational standing. Moreover, regardless of the private purposes of stockholders, states charter business corporations for the purpose of engaging in commerce, and grant them many privileges that nonprofit corporations do not receive, so that they may more effectively engage in commerce. Consequently, a business corporation cannot raise free exercise claims based on the private religious purposes of stockholders.

The Court's decision in *Citizens United* v. *FEC*, 558 U.S. 310 (2010), does not change this analysis. That decision's analysis of corporate political advocacy expenditures does not apply to the Free Exercise Clause. The "open marketplace of ideas" that *Citizens United* relied on, *id.* at 354 (internal quotation marks omitted), has no counterpart in a corporation's demand to impose stockholders' religious strictures on employees by denying them legally guaranteed benefits.

The issues raised here are not limited to health insurance: corporate religious exercise claims could extend to environmental, labor, financial, safety, and other laws. Nor are they limited to a small number of family-owned companies. Closely held corporations employ millions of Americans, and publicly traded corporations could take advantage of a corporate religious rights doctrine by going private, or even just by vote of directors who determine that it is in the corporation's financial interests to adopt a particular religion.

While it is true that the vast majority of such corporate Free Exercise Clause challenges (including this one) should fail on the merits under *Employment Division, Department of Human Resources of Oregon* v. *Smith*, 494 U.S. 872 (1990), allowing such claims to be raised will invite mischief. Accepting corporate Free Exercise Clause claims would open state and federal courts to endless challenges to local, state, and federal laws. The Court should nip this troubling new theory in the bud.

ARGUMENT

I. Corporations do not have Free Exercise Clause rights.

A. The Court's cases involving religious exercise challenges by churches and other religious organizations do not establish that corporations have Free Exercise Clause rights because they are best understood as relying on associational standing.

1. Religious nonprofit corporations do not themselves possess Free Exercise Clause rights.

Religious nonprofit corporations, just like business corporations, are creatures of the state, and subject to its limits:

> A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created.

CTS Corp. v. *Dynamics Corp. of Am.*, 481 U.S. 69, 89 (1987) (quoting *Trustees of Dartmouth Coll.* v. *Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819) (Marshall, C.J.) (quotation marks omitted)). Dartmouth College was a nonprofit corporation, and the principle reaffirmed in *CTS Corp.* applies with equal vigor to all

corporations. Moreover, while religious and lay corporations may have had separate legal origins and constitutive theories in pre-Revolutionary England and the colonies, see 1 William Blackstone, *Commentaries* *472-480, since the Revolution they have been chartered by the state, just like any others. And as artificial creatures of the state, even religious nonprofit corporations cannot, in any meaningful sense, exercise religion *themselves*.[2]

But humans can, and that provides the key to a correct understanding of the Court's Free Exercise Clause cases brought by churches and other religious nonprofit corporations. Petitioners suggest that these cases stand for the premise that at least *some* corporations can exercise religion under the First Amendment, leaving only the question of whether corporate religious exercise rights should be limited to *nonprofit* corporations. Pet. Br. 25-26; see also Pet. App. 50a-51a (Jordan, J., dissenting); *Hobby Lobby Stores, Inc.* v. *Sebelius*, 723 F.3d 1114, 1134 (10th Cir. 2013) (en banc), cert. granted, No. 13-354 (oral argument scheduled for Mar. 25, 2014). The cases, however, do not support this premise.

None of these cases squarely addressed whether the churches and other religious organizations *themselves* held Free Exercise Clause rights, because no

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[2] The Founding generation would have been perplexed by the proposition that a corporation could exercise religion. A corporation, as Sir William Blackstone had explained, "has no soul." 1 William Blackstone, *Commentaries* *477.

one questioned the existence of those rights before the Court. Therefore, these decisions are not precedent for the proposition that religious nonprofit corporations hold Free Exercise Clause rights. See *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 272 (1990) ("The Court often grants certiorari to decide particular legal issues while assuming without deciding the validity of antecedent propositions, and such assumptions * * * are not binding in future cases that directly raise the questions."); *Citizens United* v. *FEC*, 558 U.S. 310, 377 (2010) (Roberts, C.J., concurring) ("[T]he Court generally does not consider constitutional arguments that have not properly been raised.").[3] Rather, as explained below, these cases are best viewed through the lens of associational standing, even where an associational analysis was not explicitly stated, because that understanding matches the nature of religious exercise better than the suggestion that the right of religious exercise lies in the corporation *itself*. Cf. *Second Int'l Baha'i Council* v. *Chase*, 106 P.3d 1168, 1172 (Mont. 2005) (noting

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[3] It is unsurprising that no one challenged whether churches and other religious organizations can exercise religion under the First Amendment in these cases. As explained below, these organizations' free exercise claims can be raised by their members, individually or via associational standing, and so it may have seemed overly formalistic to challenge what might have been essentially a pleading technicality. But the potential expansion of Free Exercise Clause claims to business corporations sharpens the importance of the question. See Part III, *infra*.

that a religious corporation is an "'artificial corporation of the state' intended to facilitate the *congregants'* free exercise of their religion") (emphasis added) (quoting 66 Am. Jur. 2d *Religious Societies* § 1). This distinction is critical because business corporations *cannot* use associational standing to assert stockholders' Free Exercise Clause claims. See Part I.B, *infra*.

This issue is important for three reasons. First, petitioners assert corporate Free Exercise Clause claims based on this (incorrect) analysis. Second, since the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.*, was intended to restore the Free Exercise Clause jurisprudence that preceded *Employment Division, Department of Human Resources of Oregon* v. *Smith*, 494 U.S. 872 (1990), whether corporations can exercise religion under the First Amendment is highly relevant under RFRA too. See Pet. App. 28a. Third, both the dissenting judge in the Third Circuit, and the Tenth Circuit's majority opinion in *Hobby Lobby Stores*, assumed as a necessary premise that the Court has established that religious nonprofit corporations hold Free Exercise Clause rights of their own. See Pet. App. 50a (Jordan, J., dissenting) ("[N]umerous Supreme Court decisions have recognized the right of corporations to enjoy the free exercise of religion."); *Hobby Lobby Stores*, 723 F.3d at 1134.

2. Associational standing allows nonprofit corporations to assert claims on behalf of their members.

As a general rule, "one may not claim standing in this Court to vindicate the constitutional rights of some third party." *Barrows* v. *Jackson*, 346 U.S. 249, 255 (1953). The exception known as "'representational standing,' of which the notion of 'associational standing' is only one strand, rests on the premise that in certain circumstances, particular relationships (recognized either by common-law tradition or by statute) are sufficient to rebut [that] background presumption." *United Food & Commercial Workers Union Local 751* v. *Brown Group, Inc.*, 517 U.S. 544, 557 (1996). Under the associational standing doctrine, "an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt* v. *Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977).

Despite its name, associational standing is not limited to associations. Rather, it may be asserted by various other entities, including, in certain circumstances, membership-based nonprofit corporations. See *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 458-59 (1958) (rejecting NAACP's claim of standing on its own behalf, but accepting its assertion of associational standing on behalf of members). This

derives not from any misunderstanding that nonprofit corporations are in fact associations rather than distinct artificial entities. Rather, it is based on a long-standing recognition of the roles of membership organizations in representing their members, and a standing doctrine that is flexible enough to treat as "associative" not just nonprofit corporations, but even state government agencies, so long as they display sufficient "indicia of membership." *Hunt*, 432 U.S. at 344 (recognizing associational standing of state agency on behalf of apple growers whose interests it was constituted to represent).[4]

3. The Court's Free Exercise Clause cases raised by religious nonprofit corporations are best understood through associational standing.

This associational standing analysis explains the Court's previous treatment of Free Exercise Clause claims raised by churches and other religious organizations. Free Exercise Clause cases fall into three

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[4] Some nonprofit corporations may lack "indicia of membership." For example, a nonprofit hospital corporation might not have "members" on whose behalf it can raise associational claims. Whether a particular nonprofit corporation has "indicia of membership" is a fact-based analysis and need not turn exclusively on the articles of incorporation. See *Friends of the Earth, Inc.* v. *Chevron Chem. Co.*, 129 F.3d 826 (5th Cir. 1997) (extending associational standing to a nonprofit corporation that was not structured as a membership corporation but whose constituents displayed indicia of membership).

general categories: claims challenging restrictions on basic religious activities (such as praying and proselytizing); claims challenging government intrusion into church autonomy (such as government interference with churches' selection of their leaders); and claims seeking exemptions from broadly applicable government policies. See Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 Colum. L. Rev. 1373, 1388-1389 (1981) (setting forth similar categories).

Right to engage in religious activities. Churches have championed the rights of their members to engage in worship, ritual, or proselytization activities otherwise prohibited by law. These cases – which are not analogous to the claim here – have all been raised explicitly on behalf of adherents. See *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 535 (1993) (describing challenged law's impacts on "religious exercise of Santeria church members"); see also *Gonzalez* v. *O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 420 (2006) (holding that drug statute should yield RFRA exemption "for the 130 or so American members of the [church] who want to practice" their religion); *O Centro Espirita Beneficiente Uniao Do Vegetal* v. *Ashcroft*, 389 F.3d 973, 973 (10th Cir. 2004) (en banc) (noting that the corporate plaintiff specifically filed suit as "a New Mexico corporation [suing] on its own behalf *and on behalf of all its members in the United States*")

(emphasis added), aff'd and remanded, 546 U.S. 418 (2006).[5]

Furthermore, in *all* the cases in this category, specific human members of these churches have participated in the suit as plaintiffs. See *Church of the Lukumi Babalu Aye*, 508 U.S. at 525 (identifying, as an individual plaintiff-petitioner, the church's president and priest); *Larson* v. *Valente*, 456 U.S. 228, 234 (1982) (noting that members of church initially raised free exercise claim, and church corporation joined case later).[6] Thus, *none* of these cases depend on the assumption that religious nonprofit corporations have religious exercise rights of their own, and understanding these cases as associational is more sensible than conceiving of the church as having its *own* right to worship, independent of its members.[7]

Intra-church disputes. Religious organizations have challenged excessive government entanglement in religiously based intra-church leadership disputes. See, *e.g.*, *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 132 S. Ct. 694, 709 (2012)

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[5] *O Centro* was decided under RFRA, but is relevant for its associational analysis.

[6] *Larson* was decided on Establishment Clause grounds. See *id.* at 255.

[7] That conception would suggest, for example, that if a church entered receivership after the death of its last member, the church corporation – with no adherents, and operated by a court-appointed receiver to wind down its affairs – would still somehow be able to exercise religion.

(holding that Free Exercise Clause requires "ministerial exception" to antidiscrimination laws, to "ensure[ ] that the authority to select and control who will minister to the faithful * * * is the church's alone"); *Kedroff* v. *St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94 (1952) (invalidating, under Free Exercise Clause, state law transferring control of religious nonprofit corporation from one clerical body to another).

While these cases – which are not even remotely analogous to the claim here – do not explicitly discuss associational standing, the organizations in these cases are best seen as raising associational claims on behalf of the natural persons who are the real parties in religious interest.[8] The problem is not that the state is foisting a minister or priest upon the church *corporation*, but rather upon the church *congregants*. See Fatty Gerstenblith, *Associational Structures of Religious Organizations*, 1995 B.Y.U. L. Rev. 439, 479 (1995) (arguing that in clergy discrimination cases, "although the [employer] seems to be an institution or

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[8] For a hierarchical church, whose only legal "members" may be clergy, the church corporation may assert associational standing on behalf of the clerics themselves, and on behalf of adherents who are not technically "members" of the corporation but have "indicia of membership." See *Hunt*, 432 U.S. at 344; see also *Kedroff*, 344 U.S. at 122 ("This very limited right of resort to courts for determination of claims * * * between rival parties among the communicants of a religious faith is merely one aspect of the duty of courts to enforce the rights of *members in an association*, temporal or religious, according to the laws of that association.") (emphasis added).

corporation, the institution may in fact be acting merely as an aggregate of individuals rather than exclusively in its institutional capacity").

Exemptions from generally applicable laws that impose costs on religious organizations. Religious organizations have raised challenges seeking exemptions from generally applicable laws based on financial or paperwork costs.[9] See *Jimmy Swaggart Ministries* v. *Bd. of Equalization of Cal.*, 493 U.S. 378 (1990) (challenging application of sales tax to religious materials); *Tony & Susan Alamo Found.* v. *Sec'y of Labor*, 471 U.S. 290 (1985) (challenging application of Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.*, to "associates" who were members of religious group and also performed unpaid work for foundation); *Bob Jones Univ.* v. *United States*, 461 U.S. 574 (1983) (challenging denial of tax-exempt status to religious school that discriminated on basis of race).

Since these challenges were uniformly unsuccessful (even pre-*Smith*), it is particularly perilous to infer from them a corporate right to religious exercise. The only case in this category that addressed this issue explicitly cited associational standing. See *Tony & Susan Alamo Found.*, 471 U.S. at 303 & n.26 (holding that the Foundation "ha[d] standing to raise

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[9] This category differs from Professor Laycock's third category (*conscientious* objection to government policy), see Laycock, 81 Colum. L. Rev. at 1389-90, which is not reflected in the Court's cases involving religious nonprofit corporations.

the free exercise claims of the associates, who are members of the religious organization as well as employees under the [Fair Labor Standards] Act," on their claim that application of the Act would "violate the rights *of the associates* to freely exercise *their* religion") (emphases added). But all three cases fall into the category of laws that "arguably burden only institutions * * * and not individuals." Gerstenblith, 1995 B.Y.U. L. Rev. at 478 & n.119. Indeed, in *Jimmy Swaggart Ministries* and *Bob Jones University*, the corporate plaintiffs do not seem to have attempted to identify any natural person whose religious interests were harmed; that omission may go a long way toward explaining why they lost. In any event, no one challenged the corporate plaintiffs' standing or claims of corporate Free Exercise rights in those cases, and consequently the Court's holdings do not include as a necessary predicate any conclusion that the corporations could exercise religion in the first place. See *Verdugo-Urquidez*, 494 U.S. at 272.

B. Business corporations cannot raise the claims of stockholders through associational standing.

The dissenting opinion in the Third Circuit, as well as the Tenth Circuit majority in the companion case, struggled with the relevant distinction between nonprofit and for-profit corporations, incorrectly assuming that it was primarily a distinction of federal tax law. See Pet. App. 31a (Jordan, J., dissenting) ("The government takes us down a rabbit hole where

religious rights are determined by the tax code."); *Hobby Lobby Stores*, 723 F.3d at 1135 ("What if Congress eliminates the for-profit/nonprofit distinction in tax law? * * * Or consider a church that, for whatever reason, loses its 501(c)(3) status. Does it thereby lose Free Exercise Rights?").

The distinction relevant here between business and nonprofit corporations involves not taxation, but representation. Nonprofit organizations that display "indicia of membership" can generally assert associational standing because "the primary reason people join an organization is often to create an effective vehicle for vindicating interests that they share with others." *UAW* v. *Brock*, 477 U.S. 274, 290 (1986). Such organizations "historically have been organized specifically to provide certain community services, not simply to engage in commerce." *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints* v. *Amos*, 483 U.S. 327, 344 (1987) (Brennan, J., concurring in the judgment). Moreover, a nonprofit "must utilize its earnings to finance the continued provision of the goods or services it furnishes, and may not distribute any surplus" to its members. *Ibid.* When members join nonprofit organizations, they do so without expectation of any direct pecuniary gain from that membership, but rather to support and associate with its mission, which (whatever it is) cannot be profit for the members. See Henry B. Hansmann, *The*

Role of Nonprofit Enterprise, 89 Yale L.J. 835, 838 (1980).[10]

For a church or similar religious organization, an associational religious exercise claim will almost always be "germane to the organization's purpose," *Hunt*, 432 U.S. at 343, because religious exercise is the essence of such an organization's purpose. Cf. *Brock*, 477 U.S. at 290 ("The very forces that cause individuals to band together in an association will thus provide some guarantee that the association will work to promote their interests."). And a state charter for a religious nonprofit corporation creates an entity that has certain powers (which unincorporated

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[10] Of all the differences between nonprofit and for-profit corporations, federal tax deductibility for charitable contributions is one of the least informative. That deduction dates to 1894, yet the distinction between business, religious, and secular nonprofit corporations was known already to Blackstone. Compare *Bob Jones Univ.*, 461 U.S. at 589-590 (tracing history of charitable exemption) with 1 William Blackstone, *Commentaries* *470-471 (dividing corporations into three categories: civil, ecclesiastical, and eleemosynary). Moreover, it does not even correspond well with the nonprofit category, since there are nonprofit corporations that do not qualify for the tax deduction, see 26 C.F.R. 1.501(c)(3)-1(c)(3), and entities besides nonprofit corporations that do, see 26 C.F.R. 1.501(c)(3)-1(b)(2). The fundamental distinction between for-profit and nonprofit corporations derives from the law of the state that grants the charter creating the corporation. For example, Pennsylvania, under whose law petitioner is incorporated, enshrines this distinction in its incorporation statute by providing different bodies of law for different types of corporations. Compare 15 Pa. Cons. Stat. Ann. §§ 1101 *et seq.* (governing business corporations) with *id.* §§ 5101 *et seq.* (governing nonprofit corporations).

associations lack) on the understanding that those powers, and any money received through the exercise of those powers, will be *used* for that purpose (rather than private gain). Thus, a Free Exercise Clause claim raised by a church or non-church religious organization on behalf of its members will nearly always be germane to the purpose of that organization, because protecting and asserting the religious exercise rights of members is typically a core interest of such organizations.

By contrast, business corporations are chartered by states for the purpose of engaging in commerce. They may raise the constitutional claims of others through the more limited third-party standing (*jus tertii*) doctrine, which requires a more extensive examination of why the natural person cannot participate directly and why the corporation should be allowed to raise claims on her behalf.[11] In fact, when the substantive religious rights of natural persons are actually burdened, those natural persons can often

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[11] Under this doctrine, "[w]hen a person or entity seeks standing to advance the constitutional rights of others, [the Court] ask[s] two questions: first, has the litigant suffered some injury-in-fact, adequate to satisfy Article III's case-or-controversy requirement; and second, do prudential considerations * * * point to permitting the litigant to advance the claim?" *Caplin & Drysdale, Chartered* v. *United States*, 491 U.S. 617, 624 n.3 (1989). To answer the prudential inquiry, the Court considers "three factors: the relationship of the litigant to the person whose rights are being asserted; the ability of the person to advance his own rights; and the impact of the litigation on third-party interests." *Ibid.*

present the case directly, without the corporation as intermediary. That helps explain how *Gallagher* v. *Crown Kosher Super Market of Massachusetts, Inc.*, 366 U.S. 617 (1961), could have been resolved if the Court had reached the merits. In that case – apparently the only previous free exercise challenge by a for-profit business corporation in this Court – various plaintiffs challenged a Sunday closing law as interfering with the free exercise of the Jewish religion. Besides the lead corporate plaintiff (a kosher supermarket), the plaintiffs also included four named natural persons, representing two classes: Sabbath-observant kosher food customers, and Orthodox rabbis. *Id.* at 618-619. While the Court avoided deciding which of the plaintiffs could raise free exercise claims because their merits case was foreclosed by another decision issued that same day, see *id.* at 631, the Court had the benefit of the presentation of the religious interests of numerous natural persons representing a range of interests. If the Court had considered *Crown Kosher* without its companion case, it would not have needed to allow the corporate plaintiff to raise third-party claims on behalf of natural persons (since those natural persons were present in the case), let alone adopt a theory of corporate religion. Thus, in many cases, third-party standing for corporations will be unnecessary and therefore inappropriate.

But business corporations cannot assert *associational* standing because they do not display "indicia of membership" – they display indicia of *investment*.

They are not (and are not analogous to) *associations* of their stockholders, but rather separate legal entities that are authorized by state law to issue stock to be *purchased* by stockholders. And state law grants stockholders only very limited rights. See, *e.g.*, *SEC* v. *Transamerica Corp.*, 67 F. Supp. 326, 330 (D. Del. 1946) ("The only power which stockholders normally have to control the corporate machinery is exhausted when they elect corporate directors."), modified, 163 F.2d 511 (3d Cir. 1947). Because business corporations are not associations of their stockholders, courts have not extended associational standing to them. See *Polaroid Corp.* v. *Disney*, 862 F.2d 987, 998-999 (3d Cir. 1988) (rejecting business corporation's claim of associational standing on behalf of stockholders). And treating business corporations as associations of their stockholders for Free Exercise Clause purposes would not just contradict the very state corporate law that creates such corporations – it would *constitutionalize* that contradiction. Cf. *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541, 549 (1949) ("Whatever theory one may hold as to the nature of the corporate entity, it remains a wholly artificial creation whose internal relations between management and stockholders are dependent upon state law.").

Moreover, states grant business corporations certain powers that are not available to nonprofits (most obviously, the authority to issue stock and distribute profits to stockholders) *precisely* because, from the government's perspective, business corporations have the main purpose of engaging in commerce.

Individual stockholders may well have private purposes beyond profit. But these are legally superfluous to the purpose for which the state has granted the charter: to pursue business. See *Bradfield* v. *Roberts*, 175 U.S. 291 (1899) (holding that Congressional appropriation to pay nonprofit hospital corporation was not establishment of a religious sect simply because incorporators were members of monastic order); cf. *Amos*, 483 U.S. at 344 (Brennan, J., concurring in the judgment) (noting that the fact that a nonprofit must use any surplus funds towards its mission rather than distribute them as profit "makes plausible a church's contention that an entity is not operated simply in order to generate revenues for the church, but that the activities themselves are infused with a religious purpose").[12]

Finally, allowing business corporations to raise associational claims on behalf of stockholders would swallow the rule that a corporation has no Fifth Amendment privilege against self-incrimination – the corporation would simply assert an associational claim on behalf of a stockholder. Cf. *Braswell* v. *United States*, 487 U.S. 99 (1988) (reaffirming that corporations do not have privilege against self-incrimination, and holding that sole stockholder of corporation could not challenge subpoena for corporate records as violating his own self-incrimination rights).

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[12] For this reason, the Ninth Circuit's analysis in *EEOC* v. *Townley Eng'g & Mfg. Co.*, 859 F.2d 610 (9th Cir. 1988), which depends on an associational analysis, is incorrect.

II. *Citizens United* should not be extended to create corporate Free Exercise Clause rights.

The Court's decision in *Citizens United* v. *FEC*, rejecting the argument that corporate campaign expenditures can be regulated differently from human political speech "because [corporations] are not natural persons," 558 U.S. 310, 343 (2010), does not control this matter. Notwithstanding the Court's conclusion that corporate communications are protected by the Speech Clause, *Citizens United* provides no justification for a concept of corporate religious exercise.

The First Amendment's clauses guarantee different rights, and while they are not unrelated, they emerged from different historical contexts and serve different purposes. As the Third Circuit correctly observed, "each clause has been interpreted separately." Pet. App. 22a. *Citizens United* addressed restrictions on corporate political advocacy – not religion. And while the Court noted a series of late twentieth-century cases extending certain First Amendment protections to corporations, see *Citizens United*, 558 U.S. at 342, none concerned the Free Exercise Clause.

Moreover, the reasoning of *Citizens United* does not apply to a claim for an exemption from a government regulation under the Free Exercise Clause. The Court focused on the "'open marketplace' of ideas protected by the First Amendment," and emphasized the importance of allowing corporate "voices and

viewpoints [to] reach[ ] the public and advis[e] voters on which persons or entities are hostile to their interests." *Id.* at 354 (quoting *N.Y. State Bd. of Elections* v. *Lopez Torres*, 552 U.S. 196, 208 (2008)). There is no counterpart to these concerns in this Free Exercise Clause challenge; the challenged insurance requirement does not impede anyone's ability to spread his or her religion to others, because the requirement does not even touch upon such matters.

Finally, the rationale behind *Citizens United* does not support claims of corporate constitutional rights to disregard laws designed to benefit employees. The corporate political advocacy at issue in *Citizens United* did not preclude employees from engaging in their own advocacy, nor otherwise directly reduce their speech rights. Here, the corporation seeks to *restrict* religious freedom by imposing the religious strictures of five stockholders on nearly one thousand employees (of various religions) whose legally guaranteed benefits the corporation claims a constitutional right not to provide. Cf. *Estate of Thornton* v. *Caldor, Inc.*, 472 U.S. 703, 710 (1985) ("The First Amendment . . . gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities.") (quotation marks and citation omitted). Business corporations' economic power over large numbers of workers of different religions derives in large measure from the state-granted privileges of incorporation that are not available to sole proprietorships or partnerships. Cf. *United States* v. *Lee*, 455 U.S. 252, 254 (1982) (noting that the sole proprietor defendant "employed

several other Amish" at his farm and carpentry shop). This case is not about religious dissent – it is about the exertion of state-assisted economic power to diminish employees' abilities to make their own choices (in line with their own religious traditions) as compared to a federally guaranteed baseline.

III. Many local, state and federal laws, and millions of Americans, could be adversely affected by creating a "corporate religious exercise" doctrine.

A. Corporate claims of religious exemptions from generally applicable law could extend to environmental, financial, and other protections.

Allowing business corporations to raise Free Exercise Clause challenges would open the courts to untold new constitutional challenges. The Free Exercise Clause could then join the Speech Clause as a basis for corporations to challenge state and federal laws regarding subjects from employee break-room "know your rights" posters to cigarette warning labels. See, *e.g.*, *Nat'l Ass'n of Mfrs.* v. *NLRB*, 717 F.3d 947 (D.C. Cir. 2013) (holding that a requirement to post an 11"x17" poster advising employees of their federal rights violated manufacturing corporations' First Amendment rights); *R.J. Reynolds Tobacco Co.* v. *FDA*, 696 F.3d 1205 (D.C. Cir. 2012) (holding that a requirement to print updated cigarette warning labels violated tobacco corporations' First Amendment rights).

Such corporate claims for religious exemptions already occur in at least one circuit. See *EEOC* v. *Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 612 (9th Cir. 1988) (holding that mining equipment manufacturer, which had fired atheist machinist for refusing to attend mandatory prayer services, had Free Exercise Clause right to be exempt from Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*). But the claims could easily move beyond anti-discrimination laws, as in these hypothetical examples:

- A chain of for-profit debt relief agencies held by stockholders who believe in the "prosperity gospel"[13] objects on religious grounds to a state debtors' protection law that requires debt relief agencies to disclose that they are debt relief agencies and to avoid advising customers to incur more debt. Cf. *Milavetz, Gallop & Milavetz, P.A.* v. *United States*, 559 U.S. 229 (2010) (rejecting Speech Clause challenge to similar provisions in a federal statute).

- A Rastafarian-held business corporation decides to evangelize by advertising and selling drug paraphernalia, and raises

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[13] The prosperity gospel teaches that "if you have sufficient faith in God and the Bible and donate generously, God will multiply your offerings a hundredfold." Laurie Goodstein, *Believers Invest in the Gospel of Getting Rich*, N.Y. Times, Aug. 16, 2009, at A1.

religious objections to a state law prohibition. Cf. *Garner* v. *White*, 726 F.2d 1274 (8th Cir. 1984) (rejecting Speech Clause challenge to such a prohibition).

- Stockholders of a pulp-and-paper corporation believe that global warming is a Satanic hoax perpetrated by an international Masonic cabal, and raise religious objections to participation in a state greenhouse gas emissions reporting program. Cf. Bruce Wilson, *Fatima Center Leaders Claim Climate Change Is a Satanic Hoax To Annihilate and Enslave Humanity*, http://www.talk2action.org/story/2013/9/4/12211/30077 (last visited Jan. 23, 2014).

To be sure, the vast majority of such challenges would fail on the merits because the laws challenged would be neutral laws of general applicability. See *Smith*, 494 U.S. at 881-883. However, the fact that a federal appeals judge determined that the insurance coverage obligation at issue here is neither neutral nor generally applicable, see Pet. App. 88a (Jordan, J., dissenting), demonstrates that there is a real possibility that corporate religious exercise challenges to labor, environmental, and other laws could find purchase if allowed. Corporations will raise religious challenges to local, state, and federal laws in state and federal courts if the Court does not clarify that for-profit business corporations cannot assert such claims.

B. Millions of Americans could be denied the benefits of democratically enacted laws because of exemptions based on the religious views of corporate stockholders.

The corporate religious exercise theory could, if allowed, extend far beyond the relatively small number of closely held, family-owned corporations that have challenged the statute at issue in this case. Conestoga Wood Specialties Corporation employs nearly a thousand workers, see Pet. App. 12a, and the respondent in *Sebelius* v. *Hobby Lobby Stores*, No. 13-354, employs some 13,000. *Hobby Lobby Stores*, 723 F.3d at 1122. But many private corporations employ far more:

- Aramark: 259,000
- Publix Super Markets: 158,000
- Hilton Worldwide: 147,000
- Cargill: 140,000
- Dell: 111,300

Forbes, *America's Largest Private Companies*, http://www.forbes.com/largest-private-companies/list (last visited Jan. 23, 2014). Approximately 20.7 million Americans work for firms of 20-99 employees, and a further 17.5 million Americans work for firms of 100-499 employees. See U.S. Census Bureau, *Statistics about Business Size (including Small Business)*, http://www.census.gov/econ/smallbus.html (last visited Jan. 23, 2014). Firms of this size are typically

incorporated (and rarely publicly traded), so almost 40 million Americans may work for closely held corporations.

It is no answer that many privately held corporations are not currently owned by religious stockholders. While Conestoga Wood Specialties Corporation's stockholders have held their religious views for many years, allowing petitioners' claim to prevail could lead to a rash of corporate epiphanies. Contrary to the Tenth Circuit's assurance that "corporations are not known to have epiphanies or sudden conversions," *Hobby Lobby Stores*, 723 F.3d at 1150, recognition of new corporate religious exercise rights could lead to precisely that outcome. For example, the currently secular stockholders of a closely held corporation could themselves undergo (or simply assert) a personal religious transformation, or sell to religious investors. Indeed, profit-maximizing investors would almost certainly do so if religion could give the corporation a competitive advantage not enjoyed by other businesses, such as an exemption from applicable zoning or labor law.

But this issue goes beyond corporations that are privately held today. A majority (or more) of shares of a publicly traded corporation could be acquired, and the corporation taken private, by religious investors. Given the substantial cost savings potentially available, there would be an economic incentive for religious equity investors to buy controlling positions in regulated corporations; they could increase profit margins by asserting religious exemptions to the wide swath

of employment, labor, environmental, worker safety, and financial laws that affect modern business. And there would be a similar economic incentive for investors to join religions that can assert such exemptions. Cf. *Lee*, 455 U.S. at 263 n.3 (Stevens, J., concurring in the judgment) ("A tax exemption entails no cost to the claimant; if tax exemptions were dispensed on religious grounds, every citizen would have an economic motivation to join the favored sects.").

Even publicly traded corporations could adopt economically advantageous religious views; indeed, directors might well have a fiduciary *duty* to declare that the corporation practices a religion that objects to various laws if it were profitable to do so. Directors have a fiduciary duty to act in the corporation's interests. 15 Pa. Cons. Stat. Ann. § 1712(a) ("A director of a business corporation shall stand in a fiduciary relation to the corporation and shall perform his duties as a director * * * in the best interests of the corporation."); accord *Malone* v. *Brincat*, 722 A.2d 5, 10 (Del. 1998). If the directors determined that higher profits were in the corporation's interests and that the strictures of a particular religion could reduce expenses and increase profits through a religious exemption from otherwise applicable law, then the directors might well determine that they are *obligated* to vote for the corporation to adopt that religion. This, in turn, would result in corporations leveraging their economic power, through corporate religion, to deprive workers, investors, and communities of the protections that they had achieved through the

democratic process. Extending the Free Exercise Clause to business corporations would not protect freedom; it would diminish it.

CONCLUSION

Corporations cannot exercise religion under the First Amendment, and for-profit business corporations cannot assert the religious exercise rights of their stockholders. The Court should affirm the judgment below.

Respectfully submitted,

RONALD A. FEIN
Counsel of Record
JOHN C. BONIFAZ
FREE SPEECH FOR PEOPLE
48 North Pleasant Street, Suite 304
Amherst, Massachusetts 01002
(413) 253-2700
rfein@freespeechforpeople.org

BEN T. CLEMENTS
CLEMENTS & PINEAULT, LLP
24 Federal Street
Boston, Massachusetts 02110
(857) 445-0133

JEFFREY D. CLEMENTS
9 Damonmill Square, Suite 4B
Concord, Massachusetts 01742
(978) 287-4901

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